Supreme Court, U.S.
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No. 02-70

In the Supreme Court of the United States

ERNIE ROE, WARDEN,

PETITIONER,

V.

JOAQUÍN LESO FERNANDEZ,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT JOAQUÍN LESO FERNANDEZ'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit Court of Appeals err in finding that the California state courts applied an incorrect legal standard, contrary to federal law as pronounced in *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), when they expressly employed the "strong likelihood" test in *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (Cal. 1978), without reference to the more lenient "reasonable inference" test in *Batson*?

2. Did the Ninth Circuit Court of Appeals err in finding that, based on the facts and circumstances surrounding the prosecutor's exercise of a pattern of peremptory strikes against prospective jurors of a particular race, Fernandez established a *prima facie* showing of discrimination under *Batson*?

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OPINIONS BELOW

Respondent Joaquín Leso Fernandez ("Fernandez") concurs with Petitioner Ernie Roe's recitation of Jurisdiction and the Statement of Constitutional and Statutory Provisions. Petitioner fails to provide a recitation of the Opinions Below.

The Opinion of the United States Court of Appeals for the Ninth Circuit is published in *Fernandez v. Roe*, 286 F.3d 1073 (9th Cir. 2002). (Appendix H at 73-98). The Report and Recommendation, Order Adopting the Report and Recommendation and Judgment of the United States District Court for the Central District of California are unreported. (Appendix D at 42-67, E at 68 and F at 69-70). The Opinion of the California Court of Appeals and the Order of the California Supreme Court denying Fernandez's state habeas petitions are likewise unreported. (Appendix C at 20-41 and D at 46).

STATEMENT OF THE CASE

I. Procedural History

Fernandez was tried in the Superior Court of the State of California for the County of Riverside for his alleged role in the death of a member of a rival gang, the "Brown Knights," on January 29-30, 1994. After a jury trial, he was convicted of one count each of second-degree murder and conspiracy to commit murder, and sentenced to a prison term of 15 years to life. (Petition at 2 and Appendix H at 74). On February 14, 1997, the California Court of Appeals issued an opinion reversing Fernandez's conviction for conspiracy to commit murder and affirming the judgment in all other respects. (Appendix C at 41). In that opinion, the California Court of Appeals further considered two motions brought by Fernandez during jury selection at his trial, contesting on the ground of racial bias the prosecutor's use

of peremptory challenges, and determined that the trial court did not err in finding that Fernandez had failed to establish a *prima facie* case of discrimination under *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (Cal. 1978). (Appendix C at 27). In making its determination, the California Court of Appeals did not apply the standard set forth in *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), which requires only that a criminal defendant show facts and circumstances that "raise an inference" of exclusion based on race or ethnicity in order to establish a *prima facie* case. Conversely, and expressly applying the *Wheeler* standard, it held that Fernandez had not shown a "strong likelihood" that the prosecutor had challenged the prospective jurors on account of their race or ethnicity, and therefore he had not established a *prima facie* case of discrimination. Thereafter, Fernandez filed two petitions for habeas corpus in the California state courts, both of which were denied by final order of the California Supreme Court on May 28, 1997. (Appendix D at 46).

On October 8, 1997, Fernandez filed in the District Court for the Central District of California a petition for writ of habeas corpus, alleging, *inter alia*, that the state trial court had erred in denying his *Wheeler* motions challenging the prosecutor's exercise of peremptory challenges to exclude from the jury panel four Hispanic and two black prospective jurors. (Appendix D at 43). On September 9, 1998, the district court adopted the Magistrate's Report and Recommendation, which determined that the trial court did not err in finding that Fernandez failed to establish a *prima facie* case of discrimination, and denied the petition with prejudice. (Appendix E at 68 and F at 69-70).

Fernandez timely appealed the district court's decision. On March 23, 2000, the Ninth Circuit Court of Appeals

granted a partial certificate of appealability with regard to the issue of whether the district court erred by denying Fernandez's claim that the trial court erred when it denied his *Wheeler* motions, in light of *Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000), which had held that California courts following the *Wheeler* language apply an incorrect legal standard for the determination of a *prima facie* case under *Batson*, 476 U.S. 79. (Appendix G at 71-72). In an opinion filed April 8, 2002, the Ninth Circuit Court of Appeals determined that because the California state courts applied an incorrect legal standard, contrary to federal law as pronounced in *Batson*, Fernandez's *Batson* claims must be reviewed *de novo*. (Appendix H at 89). The Ninth Circuit further determined, upon conducting a *de novo* review, that Fernandez had established a *prima facie* case of discrimination under *Batson*. Accordingly, the Ninth Circuit vacated the district court's denial of Fernandez's habeas corpus petition as to the *Batson* claim and remanded to the district court to conduct an evidentiary hearing to determine whether there was a *Batson* violation in the trial court. (Appendix H at 97-98).

II. Factual Background

Fernandez concurs with the balanced summary of the relevant factual record contained in the Ninth Circuit Court of Appeals' opinion.

At Fernandez's trial, approximately 60 potential jurors were called for voir dire. (Appendix H at 82). Of these, seven were Hispanic, and two were African-American. (*Id.*) The prosecutor exercised peremptory challenges to exclude four of the seven Hispanics. Of the remaining three, the trial judge excused one for cause; the defense exercised a peremptory challenge against one; and one was seated on the jury. The prosecutor also exercised peremptory

challenges against both of the African-American members of the venire. (*See id.*)

In the first round of challenges, without any direct questioning by the prosecutor or the court, the prosecutor used his second prosecutorial peremptory to strike the first Hispanic veniremember. (*Id.* at 83). In the next round, the prosecutor used his 9th and 11th peremptory challenges to strike two more Hispanics; both were summarily struck without any direct questioning almost immediately after having been seated in the jury box. (*Id.*) In the third round, again without any questioning, the prosecutor used his 14th peremptory to strike a fourth Hispanic veniremember. (*Id.*)

After the prosecutor's challenge against the fourth Hispanic juror, Fernandez's trial counsel objected under *Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, to all the prosecutor's peremptory challenges against the prospective Hispanic jurors. (*Id.* at 83). The trial court did not request an explanation from the prosecutor of his challenges. (*Id.* at 83). However, the prosecutor volunteered that his challenges were based on scores he had assigned to juror questionnaires, upon which the prospective jurors' surnames appeared, before voir dire commenced. (*Id.*) The trial court did not review any of the juror questionnaires.

Without reviewing the questionnaires, the trial court denied the *Wheeler* motion, stating that at that time, it did not appear that the prosecutor was systematically seeking to exclude from the jury Hispanic prospective jurors. In so doing, the court relied on the fact that one woman, who appeared to be Hispanic, had not yet been challenged and remained seated in the jury box – though subject to future challenge. (*Id.* at 84). While it denied Fernandez's motion, the trial court admonished the prosecutor that "if there are

any further Hispanics excused from the jury, that would cause me to conclude that a *prima facie* showing [of discrimination] has been made." (*Id.*)

When voir dire continued, the prosecutor used his 17th peremptory challenge to strike the only African-American prospective juror in the box at that time – again without any direct questioning. (*Id.* at 85). Then, during the selection of the alternate jurors, the prosecutor exercised his 20th peremptory to strike, without any direct questioning, the second and only other African-American prospective juror in the venire. (*Id.*) After the prosecutor struck the second and only other black prospective juror, Fernandez's attorney brought a second *Wheeler* motion, based on the State's exclusion of "people of color." (*Id.*) The prosecutor again volunteered that he had assigned the black alternate juror a low score on her juror questionnaire and that she appeared to be disinterested in the process. Again without requiring the prosecutor to explain the use of his peremptories beyond what he had volunteered, and without reviewing any of the juror questionnaires, the trial court concluded that no *prima facie* case of discrimination against African-Americans had been established and denied the motion. (*Id.*)

REASONS FOR DENYING THE WRIT

The Petition does not identify any issue that even remotely merits this Court's attention. The heart of this case involves a collateral and belated challenge to a well-settled line of Ninth Circuit cases holding that the California state courts apply an incorrect legal standard, contrary to federal law as pronounced in *Batson*, when they expressly employ the impermissibly stringent "strong likelihood" test in *Wheeler*, without reference to the more lenient "reasonable inference" test in *Batson*. The Court of Appeals

applied this line of previously decided cases to the instant case; however, at no time prior to the instant Petition did Petitioner challenge the propriety of that application. The Court of Appeals did not announce a new rule of law or legal standard that is inconsistent in any way with the decisions of this Court or any other Court of Appeals.

The remainder of the Petition involves a challenge to the Court of Appeals' fact-specific determination that, based on the facts and circumstances surrounding the prosecutor's exercise of a pattern of peremptory strikes against Hispanic and African-American prospective jurors, Fernandez established a *prima facie* showing of discrimination under *Batson*. This aspect of the Court of Appeals' ruling is in complete accordance with the decisions this Court. The Petition mischaracterizes the issues presented and the holdings of the Court of Appeals, and the conflicts alleged are illusory.

I. THE NINTH CIRCUIT DID NOT ERR IN FINDING THAT THE CALIFORNIA COURTS APPLIED AN INCORRECT STANDARD OF LAW, CONTRARY TO FEDERAL LAW AS PRONOUNCED IN *BATSON*, WHEN THEY EXPRESSLY EMPLOYED THE "STRONG LIKELIHOOD" TEST IN *WHEELER* WITHOUT REFERENCE TO THE MORE LENIENT "REASONABLE INFERENCE" TEST IN *BATSON*

Petitioner erroneously contends that the Ninth Circuit erred in finding that the state courts applied an incorrect standard of law, contrary to clearly established federal law, when, in determining whether Fernandez had established a *prima facie* case of discrimination, they applied the "strong likelihood" test in *Wheeler* rather than the "reasonable

inference" test in *Batson*. Petitioner does not dispute that for purposes of this inquiry, *Batson* constitutes clearly established federal law. (Petition at 7). Neither does Petitioner refute that the Ninth Circuit is entitled to employ a *de novo* standard of review to federal constitutional claims once it has properly determined that the state courts employed a legal standard contrary to clearly established federal law. Rather, Petitioner first contends that the state courts' application of *Wheeler*'s "strong likelihood" test is not contrary to federal law because according to the California Supreme Court, in California, a "strong likelihood" means a "reasonable inference." (Petition at 8). Petitioner's argument is without merit.

In contending that the Ninth Circuit erred in finding the state courts' application of the "strong likelihood" test was contrary to federal law, Petitioner primarily challenges the propriety of the Ninth Circuit's prior ruling in *Wade*, 202 F.3d 1190. In *Wade*, decided in February of 2000, the Ninth Circuit considered for the first time whether California courts, in following the "strong likelihood" language of *Wheeler*, are applying the correct legal standard for a *prima facie* case under *Batson*. *See Wade*, 202 F.3d at 1197. In so doing, the Ninth Circuit expressly recognized the deferential standard of review set forth in Section 2254(d) of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and properly concluded that state court determinations of law must be accorded deference on appeal unless they were "contrary to" or involved an "unreasonable application of" clearly established federal law. *Id.* at 1195. Nevertheless, according to the court, while the trial court's fact-specific determination of whether a defendant has established a *prima facie* case of discrimination under *Batson* is generally reviewed with great deference, where, as here, the trial court applies the wrong legal standard in

making the *prima facie* case determination, the standard rules of deference do not apply. *See id.* at 1195.

The court in *Wade* then went on to consider the question of whether *Wheeler*'s "strong likelihood" test is consonant with the "reasonable inference" test of *Batson*. In comparing the *Wheeler* and *Batson* standards, the Ninth Circuit examined closely California courts' construction of the *Wheeler* standard and concluded that at least since 1994, when a panel of the California Court of Appeals expressly disavowed any contention that the "strong likelihood" and "reasonable inference" tests were coterminous, the *Wheeler* and *Batson* standards were no longer consistent in California. *See id.* at 1196. The Ninth Circuit based its ruling on *People v. Bernard*, 27 Cal.App.4th 458, 32 Cal.Rptr.2d 486 (1994), a case in which the California Court of Appeals rejected previous holdings finding *Wheeler* and *Batson* compatible, and which concluded that:

> Although the *Fuller* court expressed doubt as to whether the Supreme Court in *Wheeler* in fact intended a threshold *prima facie* standard consisting of a "strong likelihood" in light of the ultimate "reasonable inference" test to be utilized by the trial court, we are convinced the Supreme Court intended the meaning of its carefully crafted language . . . and reject any dictum to the contrary.
>
> . . . To incorporate the "reasonable inference" standard into the *prima facie* showing might easily transform removal of each and every juror belonging to a cognizable group into a *Wheeler* hearing. Further, a reduction of the *prima facie* standard to a "reasonable

> inference" test would reduce the trial court's discretion and judgment at a time when it is uniquely situated to observe the nature and extent of voir dire as well as the attitude and awareness of the prospective juror.

Wade, 202 F.3d at 1196 (*quoting Bernard*, 27 Cal.App.4th at 465, 32 Cal.Rptr.2d 486).

Thus, according to the Ninth Circuit in *Wade*, since the California Court of Appeals explicitly rejected the idea that "reasonable inference" and "strong likelihood" mean the same thing, California state courts have applied a lower standard of scrutiny to peremptory strikes than the federal constitution permits. *See id.* Significantly, the court in *Wade* further noted that since 1994, the California Supreme Court routinely insisted that, despite *Batson*, a criminal defendant must show a "strong likelihood" of racial bias. According to the court, while the California Supreme Court consistently cited *Batson* and *Wheeler* together as controlling law, it is solely the "strong likelihood" language from *Wheeler* that is quoted as the applicable constitutional standard, rather than the "reasonable inference" language from *Batson*. *See id.*

Thus, according to the Ninth Circuit in *Wade*, whenever the California courts follow the "strong likelihood" language of *Wheeler* without any indication that they are actually applying a "reasonable inference" test consonant with *Batson*, they apply an incorrect legal standard. In such cases, the state courts' determination of whether the defendant has established a *prima facie* case of discrimination will not be accorded deference, and a defendant's *Batson* claims will be reviewed *de novo*. *See id.* at 1197; *see also Cooperwood v. Cambra*, 245 F.3d 1042,

1046-1047 (9th Cir.), *cert. denied*, __ U.S. __, 122 S.Ct. 228, 151 L.Ed.2d 164 (2001) (following *Wade* and holding that a *de novo* standard of review applies whenever state courts use the "strong likelihood" standard, as these courts are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits).

A. Petitioner Seeks to Collaterally Challenge Prior Ninth Circuit Rulings

Petitioner's belated challenge to the Ninth Circuit's holdings in *Wade* and *Cooperwood* is devoid of merit. Petitioner's ability, if any, to collaterally challenge *Wade* in the instant case has been waived.[1] Petitioner failed to challenge below the propriety of the Ninth Circuit's prior ruling in *Wade*. Indeed, at no point prior to the instant Petition has Petitioner argued that the Ninth Circuit's non-deferential approach to state court decisions relying on *Wheeler*, as expressed in *Wade*, *Cooperwood* and again in the decision below, is contrary to 28 U.S.C. § 2254 or this Court's opinion in *Williams v. Taylor*, 529 U.S. 362 (2000). The Ninth Circuit appointed counsel and ordered supplemental briefing precisely to address the issue of whether Fernandez established a *prima facie* case of discrimination in light of the standard of review set forth in

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[1] The State of California did not petition this Court for a writ of certiorari in *Wade*. Petitioner is arguably estopped from challenging the propriety of that decision now, over 2½ years later. A court's decision has issue preclusive effect if the decision has remained unappealed although such recourse would once have been available. *See Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 99 n.6 (1954); *see also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940) (litigation by one agency is binding on other agencies of the same government, unless there are important differences in the authority of the respective agencies).

Wade. Petitioner did not challenge the scope or application of that Order. To the contrary, in his briefing to the Ninth Circuit, Petitioner expressly conceded on two separate occasions that the Ninth Circuit's reasoning in *Wade* is controlling authority and must be applied to the instant case. *See* Appellee's Supplemental Brief at 8 (stating that pursuant to *Wade*, "[o]f course, this Court should conduct an independent review of the state court record" and arguing that "[c]onsistent with the decision of the district court, an independent review establishes that the decision of the state trial court was not made in violation of *Batson* and *Wade*"); *see also* Appellee's Brief at 8, 13-15 (acknowledging the applicability of *Wade* and arguing that the district court's independent review of Fernandez's *Batson* claim satisfied the requirements of *Wade*). The only question before the Ninth Circuit here was whether and to what extent, based on the state court record in the instant case, the California courts applied the "strong likelihood" or "reasonable inference" test in determining whether Fernandez established a *prima facie* case under *Batson*. The propriety of applying a *de novo* standard of review upon a finding that the state courts applied the incorrect standard contrary to federal law was never in question.

This Court has consistently emphasized that it will review only those issues which, before being presented in the petition, have been raised in or at least passed upon by the appellate court. *See, e.g., Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-54 (1999) (declining to address issues that had not been sufficiently developed in the court of appeals); *NCAA v. Smith*, 525 U.S. 459, 469 (1999) (refusing to decide in the first instance issues that were not decided by the court of appeals); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) ("[f]inding no exceptional circumstances that would warrant reviewing a claim that

was waived below, we adhere to our general practice and decline to address respondent's [argument not raised in the district court or court of appeals]"); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) (declining to consider arguments raised for the first time before this Court and not raised or resolved in the lower courts, absent unusual circumstances, because "allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart" the integrity of the certiorari procedure). Petitioner cannot now present for the first time a challenge that was not briefed, argued or passed upon below. Petitioner has failed to demonstrate or even argue the existence of exceptional circumstances necessary to justify a departure from this Court's general practice.[2] As such, Petitioner's collateral challenge to *Wade* and its progeny should be rejected.[3]

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[2] Only rarely has this Court held that it has power to consider an issue not reached by the court of appeals. *See Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976) (discussing "prudential" rule which the Court will disregard "only in the most exceptional cases," where reasons of urgency or of economy suggest the need to address the unpresented question). Fernandez submits that no such extraordinary circumstances exist in the present case. Petitioner was well aware of the issues raised by the Ninth Circuit's decision in *Wade* and, far from ever disputing those issues, in fact squarely agreed with *Wade* and accepted it as controlling authority when briefing the issue before the Ninth Circuit.

[3] Petitioner's invocation of the California Supreme Court's decision in *People v. Box*, 23 Cal.4th 1153, 99 Cal.Rptr.2d 69, 5 P.3d 130, 152 n.7 (Cal. 2000), does not change the result. The impact of that case on the analysis in *Wade* and its progeny was considered and rejected by the Ninth Circuit in *Cooperwood*, 245 F.3d at 1047. This Court denied a petition for a writ of certiorari in *Cooperwood* on October 1, 2001 – 18 months after this Court decided *Williams*, 529 U.S. 362. Here, as in *Cooperwood*, the California Supreme Court's decision in *Box* was handed down three years after Fernandez's conviction was affirmed by the Court of Appeals – during the period in which *Bernard* was still good law and California courts were applying an unconstitutionally relaxed standard of

B. The Ninth Circuit's Decision is Consistent with AEDPA and this Court's Decision in *Williams v. Taylor*

Even assuming Petitioner is permitted to belatedly and collaterally challenge the Ninth Circuit's decisions in *Wade* and *Cooperwood*, his claim fails. Petitioner fails to identify a conflict between *Wade* and the instant case on the one hand, and any decision of this Court on the other hand. Petitioner similarly fails to identify any conflict with other circuit courts, statutes or federal regulations. Notwithstanding Petitioner's claims to the contrary, the Ninth Circuit's decision below is in complete accord with Section 2254(d) of AEDPA and this Court's holdings in *Williams* and *Batson*. Section 2254(d) provides that an application for a writ of habeas corpus shall not be granted with respect to any claim adjudicated on the merits in state court proceedings, unless the adjudication of the claims resulted in a decision that was "contrary to" clearly established federal law. *See* 28 U.S.C. § 2254(d). As this Court in *Williams* made clear, a state court decision is deemed contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1) if either (1) "the state court applies a rule that contradicts the governing law set forth in [this Court's] cases"; or (2) "the state court confronts a set of facts that are materially indistinguishable

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scrutiny. *See Cooperwood*, 245 F.3d at 1047. Petitioner's reliance on *People v. Crittenden*, 9 Cal.4th 83, 36 Cal.Rptr.2d 474, 885 P.2d 887 (Cal. 1994) (Petition at 12) is similarly disingenuous. Notwithstanding Petitioner's suggestion to the contrary, the California Supreme Court in *Crittenden* did not employ the "reasonable inference" standard in *Batson* to defendant's *Wheeler* motion. To the contrary, that Court expressly stated that to establish a *prima facie* case of discrimination under both the federal and state Constitutions, the moving party must demonstrate a "strong likelihood" that prospective jurors are being challenged on the basis of group bias. *Id.* at 115, 36 Cal.Rptr.2d 474, 885 P.2d 887.

from a decision of [this Court] and nevertheless arrives at a result different from [such] precedent." *Williams*, 529 U.S. at 405-06; *accord Penry v. Johnson*, 532 U.S. 782, 792 (2001); *Ramdass v. Angelone*, 530 U.S. 156, 165-66 (2000). As such, the "contrary to" clause of Section 2254(d)(1) permits a federal court to grant writ relief "if the state court arrives at a conclusion opposite to that reached by [this Court] on a question of law." *Williams*, 529 U.S. at 412-13.

The phrase "contrary to" is defined as "diametrically different," "opposite in character or nature," or "mutually opposed." *Williams*, 529 U.S. at 405, *quoting* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (1976). The state court's decision, thus, must be "substantially different" from this Court's relevant precedent in order to be subject to the "contrary to" clause of Section 2254(d)(1). *Williams*, 529 U.S. at 405. State court decisions will certainly be contrary to clearly established federal law if the state court applies an incorrect legal standard which contradicts the governing legal standard of law articulated by this Court. *See id.* For example, as this Court discussed in *Williams*, if a state court rejected a prisoner's claim for ineffective assistance of counsel on the basis that he failed to establish by a preponderance of the evidence that the result of the criminal proceedings would have been different, that decision would be contrary to clearly established federal law as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires only that the prisoner establish a "reasonable probability" that the result of the proceeding would have been different. *See Williams*, 529 U.S. at 405-06. Significantly, as this Court further recognized, where the state courts apply a legal standard contrary to clearly established federal law, a federal court on habeas review will be "unconstrained" by the deferential standards of

AEDPA because the state courts' decision falls within the "contrary to" clause. *See id.* at 406.

Consistent with ~~this~~ Court's analysis in *Williams*, the Ninth Circuit below simply held that because the California state courts applied to Fernandez's claims an incorrect legal standard, contrary to federal law as pronounced in *Batson*, the deferential standards in Section 2254(d)(1) did not apply. (Appendix H at 89). Thus, based on this Court's reasoning in *Williams*, the Ninth Circuit's determination in *Wade*, *Cooperwood* and the instant case, that California's more stringent "strong likelihood" test is contrary to *Batson's* more lenient "reasonable inference" test, does not conflict with AEDPA or any decision of this Court. After properly determining that the state courts failed to employ the proper legal standard consonant with federal constitutional law, the Ninth Circuit was empowered to grant the writ pursuant to *Williams* and the "contrary to" exception of Section 2254(d)(1). Because a constitutionally infirm standard contrary to clearly established federal law was employed, the Ninth Circuit was "unconstrained by § 2254(d)(1)" and, as such, *de novo* review was appropriate. *Williams*, 529 U.S. at 405-06; *see also Romine v. Head*, 253 F.3d 1349, 1365 (11th Cir. 2001) (stating that "when there is grave doubt about whether the state court applied the correct rule of governing federal law, § 2254(d)(1) does not apply. That is what we have here, so we proceed to decide the issue *de novo*, as the district court did.").

C. The Ninth Circuit Properly Found That the California State Courts Applied an Incorrect Legal Standard

Petitioner next contends that the Ninth Circuit erroneously "inferred" that the state trial court failed to employ the correct legal standard. (Petition at 10). Petitioner further contends that the Ninth Circuit erroneously found that the California Court of Appeals applied the wrong legal standard simply because it used language from *Wheeler* instead of *Batson*. (*See id.*) Petitioner's claim lacks merit. As the record below makes clear, the Ninth Circuit properly found that while the trial court did not expressly articulate the "strong likelihood" standard in finding that Fernandez had not established a *prima facie* case of discrimination, it treated both of his motions as *Wheeler*, rather than *Batson*, motions. (Appendix H at 88-89). Moreover, when the California Court of Appeals affirmed the trial court's denial of Fernandez's claims, it expressly employed the "strong likelihood" language of *Wheeler*, stating that "[t]o make a *prima facie* case, the party . . . 'must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias.'" (Appendix C at 27) (*citing People v. Turner*, 8 Cal.4th 137, 164, 32 Cal.Rptr.2d 762, 878 P.2d 521 (Cal. 1994)). Significantly, as the Ninth Circuit found, the Court of Appeals did not mention *Batson* or its more lenient "inference" test.

Petitioner further contends that even assuming the state courts applied *Wheeler*'s "strong likelihood" test rather than *Batson*'s "reasonable inference" test, the state courts' articulation of the applicable standard is not diametrically different than the *Batson* standard nor contrary to it in

character or nature. (Petition at 11). Petitioner's claims are devoid of merit. In *Williams*, this Court expressly recognized that state courts cannot employ a more stringent standard than that established by federal law. This Court defines the scope and content of the federal Constitution and this Court determines, absolutely, the constitutional floor with respect to a given constitutional right. A state court may not accord any lesser degree of protection than that required by the federal Constitution. Any deviation from the clearly established law of this Court, which results in the application an incorrect legal standard, falls within the "contrary to" provision of Section 2254(d)(1). On Petitioner's reasoning, and contrary to *Williams*, a state court's application of a "preponderance of the evidence" standard to an ineffective assistance of counsel claim would be entitled to deference because that standard, though incorrect, is not substantially different from Strickland's "reasonable probability" test. Under *Williams*, that argument fails.

II. THE NINTH CIRCUIT DID NOT ERR IN FINDING THAT, BASED ON THE FACTS AND CIRCUMSTANCES SURROUNDING THE PROSECUTOR'S EXERCISE OF A PATTERN OF STRIKES AGAINST PROSPECTIVE JURORS OF A PARTICULAR RACE, FERNANDEZ ESTABLISHED A *PRIMA FACIE* CASE OF DISCRIMINATION UNDER *BATSON*

Petitioner erroneously contends that the Ninth Circuit failed to conduct its review pursuant to AEDPA when it determined that the state courts' rejection of Fernandez's claims was an unreasonable application of clearly established federal law. Petitioner contends that the Ninth Circuit further erred when it found that Fernandez had

established a *prima facie* case of discrimination based "solely on a proportionality analysis gleaned from the record," which has no basis in this Court's clearly established law. (Petition at 15). Finally, Petitioner states that the state courts' determinations were not an unreasonable application of federal law. (*See id.*)

The Petition contains several significant misstatements of law and fact. The Petition states that the Ninth Circuit's decision contains no AEDPA analysis. This is patently false. (Appendix H at 87-89). The Petition further states that the Ninth Circuit found the state courts' determinations to be an unreasonable application of clearly established federal law. (Petition at 15). This, too, is false. Rather, as discussed above and consistent with this Court's analysis in *Williams*, the Ninth Circuit determined that the state courts' failure to apply the correct legal standard was contrary to federal law as pronounced in *Batson* and, as such, *de novo* review was appropriate. Nothing in the Ninth Circuit's opinion suggests that the "unreasonable application" provision of Section 2254(d)(1) was invoked. Indeed, as this Court noted in *Williams*, that provision applies only where the correct legal standard is identified but misapplied. *See Williams*, 529 U.S. at 407-08 (a state court decision involves an "unreasonable application" of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case.").

Contrary to Petitioner's contentions, this was not a case involving the application of the correct legal rule and, as such, Petitioner's reliance on *Bell v. Cone*, __ U.S. __, 122 S.Ct. 1843 (2002) for the proposition that state court determinations of fact must be accorded deference on appeal, is inapposite. (Petition at 17). Rather, as this Court

recognized in *Williams*, where, as here, state courts apply the incorrect rule of law, federal courts "are unconstrained" by Section 2254(d)(1) because the state court decision falls within the "contrary to" clause.[4] *Williams*, 529 U.S. at 406. Thus, notwithstanding whether state court determinations of fact are normally accorded deference, the Ninth Circuit was entitled to review Fernandez's *Batson* claims *de novo*, "unconstrained" by Section 2254(d)(1).

Petitioner further contends that the Ninth Circuit, in finding that Fernandez had established a *prima facie* case of discrimination under *Batson*, erred in relying solely on a comparative statistical analysis and in instructing the state courts on how to implement *Batson* through the use of such a "formula." (Petition at 15, 21). The Petition misstates the facts. Nothing in the Ninth Circuit's opinion indicates that it instructed the state courts on how to implement *Batson* or on how to analyze the facts and circumstances surrounding the *prima facie* case determination. Rather, in accordance with *Batson* and its progeny, as well as longstanding Ninth Circuit precedent, the court simply engaged in a comparative proportionality analysis to determine whether and to what extent the prosecutor's exercise of peremptory strikes resulted in "systematic exclusion from the venire" of minority prospective jurors. *Batson*, 476 U.S. at 94. As this

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[4] The Petition contains additional misstatements of fact worthy of note. The Petition states that based solely on the information contained in the juror questionnaires, which did not include the race of the prospective jurors, the prosecutor assigned a score to each veniremember. (Petition at 18). It is unclear from the record whether in fact the juror questionnaires included the race of the jurors. However, it is clear that the questionnaires contained the surnames of the prospective jurors from which, arguably, the race of the prospective jurors could be surmised. Moreover, the record contains no evidence to support Petitioner's contention that the prosecutor's scoring system was based "solely" on the questionnaires.

Court has recognized, proof that members of the defendant's race were "substantially underrepresented on the venire" or that the prosecutor exercised a "pattern" of strikes against a cognizable class can give rise to an inference of discrimination sufficient to establish a *prima facie* case. *See id.* at 93-97. The Ninth Circuit's comparative proportionality analysis is a permissible means of determining the existence of "systematic exclusion" or a pattern of strikes. *See id.*

Notwithstanding Petitioner's contentions, the Ninth Circuit did not base its finding of a *prima face* case of discrimination solely on a comparative statistical analysis. To the contrary, in conducting its fact-bound analysis of the facts and circumstances surrounding the prosecutor's exercise of peremptory challenges to strike four of seven Hispanic and 100% of the black jurors in the venire, the Ninth Circuit considered several relevant factors consonant with this Court's decision in *Batson*. Indeed, in conducting its analysis, the Ninth Circuit expressly recognized that under *Batson*, it must consider "all relevant circumstances" surrounding the exercise of peremptory strikes (Appendix H at 94) and that while a pattern of exclusionary strikes is not necessary for finding an inference of discrimination, "'[a] pattern of exclusion of minority venirepersons provides support for an inference of discrimination.'" (Appendix H at 90-91) (citation omitted). Specifically, in addition to analyzing the statistical evidence in terms of both the proportion of available minorities stricken and the relative rate of such strikes, the Ninth Circuit also considered the prosecutor's behavior, the timing of the strikes, the trial court's admonition after the first *Wheeler* motion expressly warning the prosecutor against striking additional jurors, and the prosecutor's failure to engage in any meaningful questioning of any of the minority jurors. (Appendix H at

93-96). The Ninth Circuit's analysis is in complete accord with *Batson*. *See Batson*, 476 U.S. at 93-97 (stating that moving party may establish a *prima facie* showing by demonstrating a pattern of strikes, total or seriously disproportionate exclusion of a cognizable class, or systematic exclusion from the venire of a cognizable class, and further recognizing the relevance of opposing party's questions and statements during voir dire examination).

Finally, in concluding that the facts and circumstances surrounding the prosecutor's exercise of peremptory strikes established a *prima facie* case of discrimination, the Ninth Circuit recognized that it was "left with a bare record of statistical disparities of peremptory strikes against Hispanic and African-American venirepersons." (Appendix H at 97). However, in so concluding, the Ninth Circuit did not hold that, as a matter of law, a finding of statistical disparity is necessary or even sufficient to establish a *prima facie* case of discrimination. Rather, the court simply recognized that because a pattern of strikes against prospective jurors of a particular race can give rise to an inference of discrimination, and, because on the record in the instant case, the statistical disparities indicated such a pattern, Fernandez had established a *prima facie* case of discrimination under *Batson*. Moreover, as the Ninth Circuit indicated, because the prosecutor's unsubstantiated explanations for striking minority venirepersons should not be considered at the *prima facie* case stage (Appendix H at 96-97), reliance on a record of statistical disparities together with the absence of countervailing evidence may be all a reviewing court can consider.

CONCLUSION

For the reasons stated above, Fernandez respectfully requests that this Court deny Petitioner's petition for a writ of certiorari.

Respectfully submitted,

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